

## DRAFT MEMORANDUM

Date: December 23, 2016

From: Mark Stein, Office of Regional Counsel, and Mel Coté, Office of Ecosystem Protection

To: File for EPA Designation of the Eastern Long Island Sound Dredged Material Disposal Site

Re: Response to December 2, 2016, Letter from NY DOS to EPA

The New England office of the United States Environmental Protection Agency (EPA) received a letter dated December 2, 2016, from Sandra Allen of the New York Department of State (NY DOS) to Kenneth Moraff of EPA. (the December 2, 2016, NY DOS Letter). The letter discusses the New York Department of State's (NY DOS) positions regarding EPA's compliance with the Coastal Zone Management Act (CZMA) in the context of EPA's November 4, 2016, Final Rule designating the Eastern Long Island Sound dredged material disposal site (ELDS) under the Marine Protection, Research, and Sanctuaries Act (MPRSA). *See* 33 U.S.C. §§ 1401, *et seq.*

EPA has carefully considered the December 2, 2016, NY DOS Letter and responded by letter to NY DOS on December 12, 2016. This memorandum to the file also addresses issues raised in the December 2, 2016, NY DOS Letter. While not necessarily repeating every point in EPA's response letter, this memorandum provides more detail than was appropriate to include in that letter but documents more completely the analysis that underlies the letter.

### **I. Key Procedural Steps in the ELDS Designation**

Before addressing NY DOS's letter, it is helpful to list key milestones relevant to EPA's compliance with the CZMA in connection with designation of the ELDS. These key milestones are as follows:

1. On April 27, 2016, EPA proposed designation of the ELDS and sought public comment on the proposal. 81 Fed. Reg. 24748 (April 27, 2016) (the Proposed Rule).
2. In conjunction with the Proposed Rule, EPA simultaneously issued a Draft Supplemental Environmental Impact Statement (the DSEIS) that evaluated, and sought public comment on, the proposed action and alternatives to it.
3. On July 18, 2016, NY DOS and the New York Department of Environmental Conservation (NY DEC) submitted joint comments to EPA on the Proposed Rule and the DSEIS (the July 18, 2016, Joint NY DOS/NY DEC Comments).
4. On July 20, 2016, EPA submitted to NY DOS a determination that EPA's designation of the ELDS (and certain other site alternatives) would be consistent to the maximum extent practicable with the enforceable policies of New York's coastal management program (EPA's July 20, 2016, CZMA Consistency Determination), which in this case includes the enforceable policies of the Long Island Sound Coastal Management Program (LIS

CMP) and the Town of Southold, New York's Local Waterfront Revitalization Program (LWRP) (collectively referred to herein as the NY CMP).<sup>1</sup>

5. On August 4, 2016, New York Governor Andrew Cuomo wrote to EPA indicating both the state's opposition to designation of any site in the eastern region of Long Island Sound and the state's intention to take legal action to block any such site designation (the August 4, 2016, Cuomo Letter).
6. On October 3, 2016, NY DOS sent EPA a letter objecting to EPA's determination that the designation of the ELDS would be consistent with the NY CMP (the NY DOS October 3, 2016, CZMA Objection).
7. On November 4, 2016, EPA issued a letter responding to the NY DOS CZMA Objection. EPA reaffirmed its determination that designating the ELDS would be consistent with the enforceable policies of the NY CMP and notified the state that EPA intended to move ahead with designating the ELDS (EPA's November 3, 2016, Response to the NY DOS CZMA Objection).
8. Also on November 4, 2016, EPA signed a Final Rule designating the ELDS (the Final Rule) and then issued a Final Supplemental Environmental Impact Statement (FSEIS) supporting the Final Rule. EPA promptly made these records publicly available, though the Final Rule was not published in the Federal Register until December 6, 2016. 81 Fed. Reg. 87820 (Dec. 6, 2016).
9. The December 2, 2016, NY DOS Letter indicates NY DOS's intent to maintain its earlier CZMA objection to EPA's designation of the ELDS. In addition, because the Final Rule designating the ELDS reflected certain changes to the boundaries of the ELDS as compared to how they had been delineated in the Proposed Rule, NY DOS directed EPA to submit a new CZMA consistency determination to NY DOS.
10. EPA responded to the December 2, 2016, NY DOS Letter, in a letter dated December 12, 2016, from Kenneth Moraff of EPA to Sandra Allen of NY DOS (EPA's December 12, 2016 Response Letter to NY DOS). In this letter, EPA indicated its disagreement that a new CZMA consistency determination was warranted or required.

## **II. NY DOS's Claim that a New or Supplemental CZMA Consistency Determination is Needed or Required is Incorrect**

The December 2, 2016, NY DOS Letter incorrectly argues that the CZMA requires EPA to submit a new CZMA consistency determination to NY DOS because EPA's Final Rule designating the ELDS adjusts the boundaries of the site that EPA proposed as its preferred alternative in the Proposed Rule. NY DOS also suggests that EPA may, alternatively, notify the NY DOS that EPA wants to use its November 4, 2016, Response to NY DOS's CZMA Objection as a new consistency determination, but NYDOS states that, if EPA does so, NY DOS will require additional information for its CZMA review. EPA disagrees that either course of action is required under the CZMA in this case.

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<sup>1</sup> EPA also determined that designation of the ELDS is consistent with the coastal management programs of both Connecticut, the state in which the ELDS is located, and Rhode Island. Both states concurred with EPA's determination.

EPA has followed the CZMA consistency process specified in the statute and the National Oceanic and Atmospheric Administration's (NOAA's) CZMA regulations. In so doing, EPA has provided NY DOS with ample information to enable the state to evaluate any potential effects on New York's coastal zone from the designation of the ELDS as well as the other alternatives considered by EPA. EPA's past submissions explain in detail why designation of the ELDS is consistent to the maximum extent practicable with the enforceable policies of the NY CMP. EPA's CZMA consistency determination is supported by the extensive record in this case, including the preamble to the Proposed Rule, the DSEIS, and EPA's July 20, 2016 CZMA Determination. Further support is provided by the preamble to the Final Rule, the FSEIS, and EPA's Response to NY DOS's CZMA Objection. Not only is NY DOS's call for a new CZMA consistency determination unjustified, but the earlier NY DOS CZMA Objection was also unfounded. EPA's decision not to submit a new CZMA consistency determination is supported by EPA's December 12, 2016 Response Letter to NY DOS as well as by this memorandum.

Points raised in the December 2, 2016, NY DOS Letter are addressed below.

**1. EPA Has Not Substantially Changed the Proposed ELDS Site Designation Since Receiving the NY DOS October 3, 2016, CZMA Objection.**

In the December 2, 2016, NY DOS Letter, NY DOS argues that EPA must submit a new CZMA consistency determination because EPA substantially changed the ELDS from the site that was earlier proposed as the preferred alternative in the Proposed Rule and that was evaluated in EPA's July 20, 2016, CZMA Consistency Determination. In its letter, NY DOS states as follows:

[t]he CZMA regulations at 15 C.F.R. § 930.43(d) do not authorize federal agencies to make substantial changes to a project post-objection unless the State has suggested such changes as an alternative to the proposed project. Otherwise, the State agency must be given an opportunity to review the modification for consistency with the State's coastal policies. EPA's designation of a new ELDS containing only the undisturbed Site NL-Wa and NL-Wb in the absence of a consistency review submission to DOS for this modified project contravened the CZMA, which provides for collaboration to occur between State and federal agencies prior to, during, and after the consistency review process.

December 2, 2016, NY DOS Letter, pp. 1-2 (footnotes omitted) (emphasis added). EPA concludes, however, that NY DOS both incorrectly interprets the CZMA and its accompanying regulations and incorrectly assesses the facts in this case.

A review of the facts in this matter establish that EPA did not make substantial changes to the ELDS designation after the NY DOS October 3, 2016, CZMA Objection.

**a. The Final ELDS Is Not a Substantial Change from the Proposed ELDS Because the Final Configuration of the ELDS Was Expressly Evaluated in the DSEIS and EPA's July 20, 2016 CZMA Consistency Determination.**

Even under NY DOS's interpretation of the CZMA and the CZMA regulations, EPA is not required to submit a new or supplemental CZMA consistency determination because the final

ELDS configuration was among the alternatives evaluated by EPA in the DSEIS and EPA's July 20, 2016, CZMA Consistency Determination.

EPA provided NY DOS and the public at large with the Proposed Rule and the DSEIS for review and comment on April 27, 2016. In the DSEIS, EPA evaluated a wide range of alternatives and made explicit both its preferred alternative and the possibility that the final site designation would involve a variation on the preferred alternative or a different alternative. The preferred alternative identified in the DSEIS and the Proposed Rule was the ELDS configuration including three component sites:

- (1) approximately the western half of the existing New London Disposal Site (NLDS);
- (2) the immediately adjacent Site NL-Wa to the west; and
- (3) the immediately adjacent Site NL-Wb farther to the west.

*See* DSEIS, pp. 5-95 to 5-100. At the same time, EPA made clear that the preferred ELDS alternative also included a number of different possible permutations of the site and that EPA was still considering those options.<sup>2</sup> *See* DSEIS, pp. 5-99 to 5-101.

EPA began by stating that it was considering a larger site that included the three component parts listed above, as well as the eastern portion of the existing NLDS. EPA called this *four*-part site the "New London Alternative." EPA then stated that it was also considering specific site boundary variations to yield a smaller site. EPA explained that "[r]educed site dimensions ... were also considered for purposes of site management, as described below and illustrated in Figure 5-5 and Table 5-10." DSEIS, p. 5-95. One of these variations was the three-part site that EPA called the "Eastern Long Island Sound Disposal Site (ELDS)." It had a surface area of 2.0 nmi<sup>2</sup>. DSEIS, p. 5-97, Table 5-10, n. 3. (As stated above, this site configuration was the ELDS that was ultimately identified as the preferred alternative in the Proposed Rule.)

EPA also specifically stated that another ELDS option to "be considered is the 1.5 x 1 nmi Area, consisting of Sites NL-Wa and NL-Wb only." DSEIS, p. 5-97. *See also, id.* at Table 5-10. Thus, in the "Preferred Alternative" section of the DSEIS, EPA indicated that it was proposing the ELDS variation that included only the western portion of the NLDS and the NL-Wa and NL-Wb areas, but EPA also explained:

[a]lternatively, USEPA could designate an ELDS that includes only the 1.5 x 1 nmi Area immediately to the west of the NLDS (*i.e.*, NL-Wa and NL-Wb), and excludes the eastern and western portions of the existing NLDS. Such a site would still provide approximately 24 million cy of capacity, based on water volume below 59 feet (18 m), while eliminating an area that has been used historically for dredged material disposal. USEPA is interested in receiving public comment on these options to help inform its final determination.

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<sup>2</sup> EPA also specified that it was still considering the Niantic Bay Disposal Site (NBDS) and the Cornfield Shoals Disposal Site (CSDS) as possible options and sought public comment on them. *See* DSEIS, pp. 5-99 to 5-101.

p. 5-99. In addition, EPA also indicated that it was contemplating excising from the ELDS two rocky areas within the NL-Wa and NL-Wb sections because they might provide relatively higher quality habitat for aquatic life. *See* DSEIS, pp. 5-97, 5-98, 5-100, Fig. 5-6.

Thus, EPA assessed a number of boundary variations for the ELDS in the DSEIS. Furthermore, EPA explicitly noted that:

[s]ince the analyses in this SEIS encompassed the entire area of each Alternative, the analyses are also applicable to any reduced site dimensions potentially selected for site management reasons.

DSEIS, p. 5-95. In other words, EPA specifically explained that its analysis covered the entire ELDS site and that, as a result, the analysis also covered the possible effects of designating any smaller site that was a subset of the larger site.

NY DOS was aware of the site variations under consideration and specifically commented on at least some of them. In the July 18, 2016, Joint NY DOS/NY DEC Comments on the Proposed Rule and the DSEIS, p. 3, the state agreed with EPA's suggestion to exclude the eastern portion of the NLDS from the ELDS. The state indicated that this would "lessen the potential impacts on sensitive habitats on Fishers Island," *id.*, presumably by moving the eastern boundary of the site farther from Fishers Island. The state also commented that "[w]e also agree that the boulder and bedrock areas, and shipwreck in NL-Wa and NL-Wb should be excluded from any disposal activities." *Id.*

EPA's July 20, 2016, CZMA Consistency Determination was based on analysis of the ELDS, including the ELDS configuration described in the Proposed Rule and the other ELDS variations assessed in the DSEIS, as well as the NBDS and the CSDS. Thus, EPA stated:

[o]n April 27, 2016, EPA also released for public review and comment a Draft Supplemental Environmental Impact Statement (DSEIS) under the National Environmental Policy Act (NEPA) that explains EPA's proposed designation of the ELDS, identifies and evaluates possible alternative courses of action, including designation of the NBDS and/or the CSDS, or pursuing the so-called "no action" alternative(s). (EPA's April 2016 DSEIS). The DSEIS also assesses the possible environmental effects of the various alternatives.

EPA's July 20, 2016 CZMA Consistency Determination, p. 1. *See also id.* at pp. 2, 14.

EPA also stated that:

EPA has determined that its proposed action would be either fully consistent, or consistent to the maximum extent practicable, with the enforceable policies of the State of New York's federally approved coastal management program (NY CMP). This determination is based on the analyses presented and referenced herein, including the analysis in EPA's April 2016 Proposed Rule and April 2016 DSEIS.

*Id.* at p. 1. Building on the DSEIS analysis, EPA's July 20, 2016, CZMA Consistency Determination, also stated that "[f]or the final site designation, EPA is planning to redraw the boundary so that the site is entirely within Connecticut waters, with the southeastern corner lying near, but on the other side of, the boundary with New York waters." Again, EPA's evaluation of the ELDS already covered that type of adjustment to the ELDS boundaries. Ultimately, for the Final Rule, EPA decided that the ELDS would exclude the western section of the NLDS as well as the rocky, boulder-strewn areas in Sites NL-Wa and NL-Wb.

As stated above, this particular variation on the ELDS was fully assessed for EPA's July 20, 2016 CZMA Consistency Determination. The adjustments made to the site boundaries resulted in a final ELDS that is entirely a subset of the proposed ELDS and the necessary analysis of the final ELDS was already provided within EPA's analysis of the proposed ELDS. The preamble to the CZMA regulations suggests that the state should be provided with timely notice of substantial changes to a federal activity so that it has an opportunity to review whether the changed project would have coastal effects that would trigger enforceable coastal zone policies. 71 Fed. Reg. 788, 800-801 (Jan. 5, 2006). Here, no substantial changes were made to the proposed action. Moreover, NY DOS and other reviewers were given ample notice that the boundaries of the designated site might change during the rulemaking process and NY DOS was given the opportunity to review the possible effects of the specific option that EPA ultimately proposed in its December 6, 2017, Final Rule. The disposal site boundary adjustments for the Final Rule also are consistent with NY DOS's comments favoring a smaller site, farther from Fishers Island, if a site was to be designated in the eastern Sound. *See* July 18, 2016, Joint NY DOS/NY DEC Comments, p. 3; October 3, 2016, NY DOS CZMA Objection, pp. 4, 27 (complaining that EPA's proposed ELDS would expand available in-water disposal capacity above that provided by the existing NLDS). Furthermore, the reduction in the size of the ELDS was coupled with a reduction in the estimated volume of dredged material from the eastern Sound that may need to be placed at an open-water site over the next 30 years (estimated amount of material to be managed reduced from approximately 22.6 mcy to 20.0 mcy).

In sum, the delineation of the ELDS in the Final Rule does not represent a substantial change from the site assessed in the DSEIS and EPA's July 20, 2016, CZMA Consistency Determination because EPA's analysis explicitly assessed the option of a site delineated as it was for the Final Rule, and EPA identified that option to NY DOS, which had the opportunity to evaluate it under the NY CMP.

**b. EPA's Designation of the Final ELDS Does Not Represent a Substantial Change from the Proposed ELDS Because the Final Site Is Smaller, is a Subset of the Proposed Site, and Will Have Less Environmental Effects.**

Even if EPA had not made clear in the DSEIS and its July 20, 2016, CZMA Consistency Determination that it was not just evaluating the ELDS option proposed as the preferred alternative in the Proposed Rule, but was also evaluating the smaller site alternative that ended up being selected for the Final Rule, the final site delineation would not represent a substantial change from what was earlier assessed. Given that the final, smaller site is merely a subset of the larger site, is outside of New York waters, and is farther from Fishers Island, the adjusted site

boundaries for the final rule will *reduce* any possible effects on New York's coastal zone. Since EPA assessed the larger site and concluded that designation of the larger site was fully consistent with the NY CMP, it necessarily follows that the smaller site is also fully consistent with the NY CMP. A reduction or minimization of effects in EPA's final action falls neatly within the scope of the original NEPA and CZMA analysis, and, therefore, does not constitute a substantial change.

The Final Rule does not represent a substantial change in effects on New York's coastal zone or the application of the enforceable policies of the NY CMP.

**c. EPA's Designation of the Final ELDS Does Not Represent a Substantial Change from the Proposed ELDS Because EPA Identified in the Proposed Rule that the NL-Wa and NL-Wb Components of the ELDS Were Not Previously Used as Disposal Sites and that they Are Containment Areas.**

In the December 2, 2016, NY DOS Letter, p. 1, NY DOS argues that one of the reasons that the Final ELDS may have different coastal effects from what were previously identified is that "the new ELDS has never served as a sediment disposal site and EPA has not proved information to show its characteristics as a containment site." This is incorrect. In the DSEIS, EPA clearly identified that sites NL-Wa and NL-Wb had not previously been used as disposal areas – but were in the vicinity of the existing NLDS – and that both were containment areas. DSEIS, 5-99 to 5-102. *See also, id.*, pp. 5-27 to 5-32, 5-34 to 5-39, 5-44, 5-83, 5-84, 5-90. EPA's July 20, 2016, CZMA Consistency Determination, which cites to EPA's DSEIS and Proposed Rule, also reflects these facts. *See* pp. 2, 21, 25, 27. As a result, these considerations do not represent substantial changes to the proposed action that was reviewed under the CZMA.

**d. NY DOS Is Incorrect When It Argues that EPA's Final Rule Represents Substantial Changes from the Proposed Rule Because It Will Cause or Allow an Increased "Concentration" of Dredged Material at the ELDS.**

NY DOS incorrectly argues that the reduced size of the final ELDS represents a substantial change in the coastal effects of EPA's action by increasing the "concentration" of dredged material proposed for the site. Specifically, NY DOS states as follows:

[t]he ELDS described in the Proposed Rule to which DOS objected is a significantly different site than the one described in the draft Final Rule. The reconfigured ELDS has been greatly reduced in size by 35% to 1.3 nmi<sup>2</sup>, however, it is still projected to receive 20 million cubic yards (mcy) of sediment, which is only an 11% reduction in the overall amount to be disposed, thus increasing the concentrations of dredged material proposed for the site by 36%.

December 2, 2016, NY DOS Letter, p. 1.<sup>3</sup> When NY DOS uses the term "concentration" in this argument, EPA understands it to be referring to the volume of material placed at a given site.

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<sup>3</sup> NY DOS appears to have undertaken the following calculations:

- 1.3 nmi<sup>2</sup> (Final ELDS surface area)/2.0 nmi<sup>2</sup> (Proposed ELDS Surface area) = 0.65 = a 35% reduction in area

Thus, for example, NY DOS would say that placing 10 mcy of material at a hypothetical 1.0 nmi<sup>2</sup> site would result in a greater “concentration” of material than if only 5.0 mcy of material were placed at that same site.<sup>4</sup>

Yet, NY DOS’s argument is incorrect and appears to reflect a misunderstanding of the relevant facts. Disposal site capacity is a volumetric measurement reflecting three-dimensions. Disposal capacity is neither determined by a two-dimensional measurement of the site’s surface area (or the “footprint”), nor is it necessarily directly proportional to the site’s surface area. As EPA explained in the DSEIS, EPA estimated the capacity of a disposal site by determining the volume of water within the site’s footprint from the bottom up to a depth of 59 feet.<sup>5</sup> Furthermore, EPA explained that capacity within a particular site will vary based on water depths and the nature of bottom features at the site. *See* DSEIS, p. 5-97, Fig. 5-10, n. 1 (“The dredged material disposal capacity at the site is smaller than the water volume below 59 feet (18 m) due to factors such as slopes of disposal mounds and the buffer between the site boundary and the toe of mounds.”). Therefore, NY DOS’s calculations based solely on surface area are simply not meaningful. Reducing a site’s surface area simply means that a smaller *area* on the bottom is available for possible placement of dredged material. It does not necessarily reflect more or less potential site *capacity*.

Furthermore, EPA evaluated the various component areas of the ELDS (and other sites) as if they would be used up to their maximum capacity. Therefore, the estimated amount of material that can potentially be placed in the NL-Wa and NL-Wb areas under the final ELDS designation is the same as what could have been placed there under the larger ELDS proposed in the Proposed Rule. As originally proposed, the larger ELDS provided more capacity than was needed for the 30-year planning period – thus, EPA stated it provided capacity for the next 30 years and beyond – but this did not mean that material would necessarily be placed at the site in an entirely uniform way across the entire site.<sup>6</sup> EPA’s

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- 20 mcy (estimated dredged material disposal volume for Final ELDS)/22.6 mcy (estimated dredged material disposal volume for Proposed ELDS) = 0.88 = 12% reduction in projected volume of material needing disposal capacity
  - 20 mcy/1.3 nmi<sup>2</sup> = 15.38 mcy/nmi<sup>2</sup> (for Final ELDS)
  - 22.6 mcy/2.0 nmi<sup>2</sup> = 11.3 mcy/nmi<sup>2</sup> (for Proposed ELDS)
  - 15.38 mcy/nmi<sup>2</sup>/11.3 mcy/nmi<sup>2</sup> = 1.36 Which would mean that the Final ELDS has a 36% greater value for mcy/nmi<sup>2</sup> than the Proposed ELDS.

The calculated value, and the metric that it represents (*i.e.*, mcy/nmi<sup>2</sup>) is not meaningful, as discussed above.

<sup>4</sup> EPA does not understand NY DOS to be using the term “concentration” in this context to refer to contaminant concentrations. As EPA has explained before in the July 20, 2016, CZMA Consistency Determination, the preamble to the Proposed Rule and the DSEIS, EPA sediment quality standards are promulgated as 40 C.F.R. Part 227 and are applied to ensure that only suitable sediments are placed at disposal sites. Nothing about EPA’s final ELDS site designation will alter contaminant concentrations as compared to what was contemplated by EPA’s ELDS site designation in the Proposed Rule.

<sup>5</sup> The water depth limit at the site is set to ensure that adequate depths are maintained above the site to prevent surface currents and storms from eroding dredged sediments from the site and to ensure safe navigation over the site.

<sup>6</sup> This is not how dredged material sites are managed by the USACE.



site evaluations were conducted based on use of the maximum capacity in each site or each component site. NY DOS's "concentration" calculations assume that dredged material would have been spread evenly across the larger ELDS so that all areas of the site would have received less material, and that final selection of the smaller ELDS necessarily means that more material will be pushed into that smaller area. These are incorrect assumptions.

No *more* material will be able to be put in the NL-Wa and NL-Wb areas as a result of the final ELDS designation. These areas were evaluated and approved to receive material up to their maximum capacity in both the DSEIS and the FSEIS. Two things changed, however, for the FSEIS. First, EPA determined that after making adjustments for the excluded rocky areas and associated buffer zones, and taking water depths and bottom features into account, the NL-Wa and NL-Wb areas provide approximately 20 mcy of dredged material disposal capacity. Second, EPA and the Corps reassessed the dredged material disposal capacity needed for material from the eastern Sound and concluded that approximately 20 mcy of capacity was needed for the next 30 years. Given that these figures matched, EPA decided to exclude the western segment of the NLDS from the final ELDS designation and designate the smaller ELDS comprised solely of Sites NL-Wa and NL-Wb. Reducing the size of the site in this manner is consistent with public comments received as well as with EPA's site designation criteria under the MPRSA. *See* 40 C.F.R. § 228.5(d); *see also* FSEIS, Response to Comments, Comment/Response #14.

Not only is NY DOS's suggestion that the final ELDS designation will increase the concentration of dredged material at the site incorrect, but the argument has no environmental significance. Disposal sites are managed to ensure that adequate water depths are maintained above the site to ensure tidal and wave-generated currents don't erode dredged sediments from the site, and to ensure safe navigation over the site. In addition, EPA's sediment quality criteria are applied to ensure that only suitable dredged material is authorized for placement at an EPA-designated site. *See* 40 C.F.R. Part 227. Together, these restrictions ensure that only suitable materials in appropriate amounts are placed within a particular site. As EPA discussed in the DSEIS and the July 20, 2016, CZMA Consistency Determination, p. 21, research and scientific studies show that benthic organisms recolonize the upper sediment layers of disposal mounds where suitable sediments are placed, which demonstrates the absence of adverse environmental effects in open-water disposal sites that are managed pursuant to the abovementioned restrictions and regulatory criteria. EPA's evaluation shows that the final ELDS can accommodate the estimated volume of material that might need to be placed there. The smaller footprint of the final ELDS will only reduce impacts to the ambient benthic community because less bottom will be disturbed and, therefore, it will only be more beneficial environmentally than the larger site, not more harmful as NYDOS suggests.

Until the December 2, 2016, NY DOS Letter, neither NY DOS nor any other commenter commented or expressed a concern about the "concentration" of material to be placed at any of the disposal site alternatives under consideration. Indeed, to the contrary, NY DOS's October 3, 2016, CZMA Objection, in effect, urged greater "concentration" of material at

other sites. Specifically, in the NY DOS CZMA Objection, p. 29, NY DOS argues that no disposal site should be designated in the eastern region of Long Island Sound because dredged material from the eastern Sound should be placed at the Central Long Island Sound, Western Long Island Sound, or Rhode Island Sound disposal sites (CLDS, WLDS, and RISDS, respectively). Yet, adding the eastern Sound material to those sites would necessarily increase the “concentration,” to use NY DOS’s terminology, of material at those sites by increasing the volume of material to be placed at those sites.

It should also be understood that the conservative estimate that dredged material capacity of 20.0 mcy over 30 years is needed at the site is not a precise regulatory value, it is a conservative value developed for planning purposes. Decisions about actual dredged material disposal projects will be made in the future in individual permit proceedings based on the relevant facts known at the time about the suitability of the material, the available capacity at the disposal site, and whether practicable alternatives to open-water placement are available. As EPA explained in the July 20, 2016, CZMA Consistency Determination, the preamble to the Proposed Rule, and the DSEIS, ongoing monitoring by EPA and USACE under a Site Management and Monitoring Plan (SMMP) will be conducted to determine whether or not the site should continue to be used over time.

EPA’s final designation of a smaller ELDS than was proposed as the preferred alternative in the Proposed Rule does not substantially change the coastal effects of EPA’s action by increasing the “concentration” of dredged material at the site.

## **2. EPA has Properly Followed CZMA Procedures in Designating the ELDS.**

The process EPA followed in this case is fully consistent with the terms of the CZMA and the applicable regulations. The regulations at 40 C.F.R. § 930.43(d) provide as follows (emphasis supplied):

(d) In the event of an objection, Federal and State agencies should use the remaining portion of the 90-day notice period (*see* § 930.36(b)) to attempt to resolve their differences. If resolution has not been reached at the end of the 90-day period, Federal agencies should consider using the dispute resolution mechanisms of this part and postponing final federal action until the problems have been resolved. At the end of the 90-day period the Federal agency shall not proceed with the activity over a State agency’s objection unless:

(1) the Federal agency has concluded that under the “consistent to the maximum extent practicable” standard described in section 930.32 consistency with the enforceable policies of the management program is prohibited by existing law applicable to the Federal agency and the Federal agency has clearly described, in writing, to the State agency the legal impediments to full consistency (See §§ 930.32(a) and 930.39(a)), or

(2) the Federal agency has concluded that its proposed action is fully consistent with the enforceable policies of the management program, though the State agency objects.

These regulations do not *require* the federal action agency to pursue negotiations with the state agency following a state objection to the federal action. The regulations only suggest that the federal and state agencies “should” use the remaining time between state objection and the end of the 90-day notice period (beginning with submission of the federal consistency determination) to try to resolve their differences. The language is permissive rather than mandatory.

Not only were federal-state negotiations not required, but it made sense in this case that they did not happen. Having issued its Proposed Rule, its DSEIS, and its July 20, 2016, CZMA Consistency Determination, EPA then received the August 4, 2016, Governor Cuomo Letter indicating that state’s opposition to any site being designated in the eastern region of Long Island Sound and the state’s intention to take legal action to block any such site from being designated. When EPA contacted NY DOS to discuss the site designation during August and September to discuss the site designation, NY DOS was unwilling to discuss the matter with EPA (*see* Memorandum to File from Lynne Hamjian dated December 14, 2016). NY DOS then took 75 days after EPA’s submission of its consistency determination to develop and submit its October 3, 2016, CZMA Objection to EPA. This left only 15 days in the 90-day notice period.

At the same time, the state’s 56-page objection, like the Governor’s letter, flatly opposed any site being designated in the eastern region of the Sound. Moreover, after sending its CZMA Objection, NY DOS did not reach out to EPA to suggest negotiations. EPA had earlier explained the urgency of completing the site designation process in as expeditious a way as possible because the existing sites in the eastern Sound – the New London Disposal Site (NBDS) and the Cornfield Shoals Disposal Site (CSDS) – are scheduled to close on December 23, 2016 (and EPA’s ELDS site designation decision will allow those sites to close). Under these circumstances, EPA decided not to pursue further negotiations with NY DOS after receiving the NY DOS Objection.

As with negotiations, federal and state agencies are also not *required* to seek mediation in response to a state objection to the federal agency’s consistency determination. *See* Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77124, 77142 (Dec. 8, 2000) (“Mediation under the CZMA and NOAA’s regulations is optional and non-binding. NOAA cannot, by rulemaking, require a Federal agency to enter into mediation. Likewise, if a State requests mediation, the Federal agency is not required to participate.”). Thus, EPA was not required to pursue mediation in this case. EPA decided not to pursue mediation for much the same reasons that it did not pursue negotiations: the state both had expressed rigid opposition to any site in the eastern Sound and had shut down informal communications with EPA, while EPA regarded it important to move forward to designate a site in the region. Moreover, NY DOS did not suggest or propose mediation to EPA. Instead, in its Objection, NY DOS only noted the availability of mediation, while also noting in particular “that the mediation process may be lengthy.” NY DOS October 3, 2016, CZMA Objection. Under these circumstances, EPA decided not to pursue mediation.

The fact that EPA made certain adjustments to the ELDS boundaries for the Final Rule (as compared to the boundaries specified in the preferred alternative in the Proposed Rule) does not change the fact that the CZMA does not require EPA to pursue negotiations with NY DOS, or seek mediation, following NY DOS's CZMA objection. Given that the regulations expressly state that after a state objection, a federal agency can go forward with its action as proposed – if it concludes that the federal action is either fully consistent or consistent to the maximum extent practicable with the enforceable policies of the state's coastal management program – without engaging in post-objection negotiations or mediation, it follows that a federal agency can go forward in the same manner if it decides to modify its proposed action to *reduce* any coastal zone effects or modifies its action in a way that does not trigger any significantly different coastal effects than those previously assessed.

NY DOS is also incorrect when it suggests that by making changes to the ELDS for the Final Rule, EPA has undertaken a “unilateral modification of the final rule without further DOS review, a procedure that is not contemplated by the CZMA.” The approach EPA followed is entirely within the bounds of the CZMA. The National Oceanic and Atmospheric Administration's (NOAA) CZMA regulations at 15 C.F.R. § 930.36(b) provide as follows (emphasis supplied):

*(b) Timing of consistency determinations.* (1) Federal agencies shall provide State agencies with a consistency determination at the earliest practicable time in the planning or reassessment of the [federal] activity. A consistency determination should be prepared following development of sufficient information to reasonably determine the consistency of the activity with the management program, but before the Federal agency reaches a significant point of decisionmaking in its review process, i.e., while the Federal agency has the ability to modify the activity. The consistency determination shall be provided to State agencies at least 90 days before final approval of the Federal agency activity unless both the Federal agency and the State agency agree to an alternative notification schedule.

Thus, the regulation clearly contemplates that a federal agency's final action may involve changes to the proposed action that the agency evaluated in its federal CZMA consistency determination without a new consistency determination needing to be prepared in every case. Otherwise, there would be a disincentive to consider comments objectively and make useful adjustments to proposed actions for fear that the administrative process would never end (*i.e.*, that every time changes are made to a proposed action after submission of a consistency determination, another consistency determination would be required). Creating such a disincentive would be highly undesirable as a matter of public policy and the law is structured and applied to avoid such results. This well-understood concept of administrative law and practice applies across many statutes, such as the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA). It also applies to the CZMA.

Finally, although NY DOS's Letter did not explicitly reference sections 930.31 and 930.46 of the C.F.R., EPA will address them briefly, to the extent that they apply to the instant case. First, 15 C.F.R. § 930.31 states, in relevant part:

“Federal agency activity” . . . also include[s] modifications of any such activity . . . which affect[s] any coastal use or resource, provided that, in the case of modifications of an activity . . . which the State agency has previously reviewed, the effect on any coastal use or resource is substantially different than those previously reviewed by the State agency.

15 C.F.R. § 930.31§ 930.31(e) (emphasis added). Thus, a modification to a previously reviewed federal activity may be deemed a new federal activity warranting a separate consistency determination if the effects on coastal uses or resources of the modification are *substantially different* than the effects reviewed initially. As discussed at length throughout this memorandum, the final ELDS is not substantially different than the preferred alternative in the Proposed Rule and does not result in substantially different, or at all different, effects on coastal uses or resources. Thus, section 930.31(e) is inapplicable and does not trigger a renewed consistency determination by EPA.

Second, 15 C.F.R. § 930.46 provides guidance for circumstances warranting supplemental consistency determinations. Specifically, 15 C.F.R. § 930.46(a) outlines procedures for instances in which a State has *concurred* with a federal agency’s consistency determination, but the agency subsequently *substantially changes* the activity prior to taking final action such that the effects of the action are *substantially different*. In this scenario, a supplemental or new consistency determination would be required. Next, 15 C.F.R. § 930.46(b) provides that if the federal agency has not provided a supplemental CZMA determination, the State may notify the federal agency that a supplemental determination is necessary. Neither of these provisions apply to this case because, as discussed herein, EPA has not substantially changed its action, the final action will not have substantially different effects on coastal uses or resources, and EPA’s changes did not come after state concurrence with a CZMA consistency determination.

EPA also considered whether 40 C.F.R. § 930.46(b) might apply to a case where a state had objected to the original federal consistency determination. EPA does not think it applies in the case of an objection given the language of the regulation. EPA also presumes that this is why NY DOS did not cite to § 930.46(a) or (b) in its December 2, 2016, Letter. That said, even if § 930.46(b) did apply in the case of an objection, EPA concludes that a supplemental consistency determination is not required. Again, the analysis of both subsections turns on whether the federal activity is substantially changed or causes substantially different coastal effects, and, as discussed above, EPA concludes that there is no substantial change to the activity or its coastal and environmental effects and, as a result, this regulation is inapplicable and does not require supplemental coordination or a supplemental consistency determination.